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IN THE SUPREME COURT

—OF THE—

UNITED STATES.

In The Matter of The Application of Albert Heff For a Writ of Habeas Corpus.

14 Orig.

Brief of Petitioner.

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Attorney for Petitioner.

JACKSON COUNTY WORLD, CIRCLEVILLE, KAN.

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In The Matter of The Application of Albert Heff For a Writ of Habeas Corpus.

Brief of Petitioner.

STATEMENT OF FACTS.

It is admitted that Albert Heff, your petitioner, was convicted in the United States District Court of Kansas, of selling intoxicating liquor to John Butler, an Indian, who at the time of said sale had received an allotment of land in severalty on the Kickapoo Indian Reservation in Brown county, Kansas, under Act of Congress of February 8, 1887.

It is further admitted that John Butler was born within the territorial limits of the United States and at

the time of the said sale was residing on his allotment in Brown county, Kansas, and had been residing on said allotment for about ten years.

BRIEF OF ARGUMENT.

It is claimed by your petitioner that John Butler having received an allotment of land in severalty under the Act of Congress of February 8, 1887, was not a ward of the government, but a citizen of the United States and of the state of Kansas.

The Act of Congress of February 8, 1887, makes all Indians to whom allotments shall have been made under the provisions of the Act, citizens of the United States and entitled to all the rights, privileges and immunities of such citizens. It further provides that upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws both civil and criminal, of the state or territory in which they may reside.

Section 6 of the Act of Congress of February 8, 1887, reads as follows, to-wit:

"SECTION 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes

of Indians to whom allotments have been made shall have the benefit and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.

"And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The aforesaid section has been construed by the Supreme Courts of several of the states, and in each and every instance the Courts have held that Indians to whom allotments have been made in severalty and upon which the preliminary patents have been issued, are citizens of the United States. In the case of the State vs. Denoyer, 72. N. W. Rep. 1015, it is said:

"Such Indians and persons of Indian descent, so residing upon lands alloted to them in severalty, and upon which the preliminary patents had been issued, are citi-

zens of the United States, and qualified electors of this state."

In State vs. Norris, 55 N. W. Rep. 1086, it is said:

"By the provisions of said act, all Indians born within the territorial limits of the United States, to whom allotments of land in severalty have been made under the provisions of said law, or other law or treaty, and all Indians, born as aforesaid, who have voluntarily taken up their residence in the United States, separate and apart from any tribe of Indians therein, and adopted the habits of civilized life, are made citizens of the United States, and such Indians residing in this state are citizens thereof.

"The actual issuance or receipt by an Indian of a patent for lands alloted to him under the act is not necessary to constitute him a citizen of the United States. When he has accepted the land alloted, taken possession thereof, and otherwise complied with the law, he becomes entitled to his patent, and his citizenship attaches."

In Wa-La-Note-Tke-Tynin vs. Carter, 53 Pac. Rep. 106, it is said:

"It seems clear to us, under the provisions of this section, that the Indians who have availed themselves of the provisions of said act, and complied with the exigencies thereof, have the same standing in the courts of the state as any other citizen of the United States."

In United States vs. Rickert, 106 Fed. Rep. 5, it is said (after quoting Section 6 of the aforesaid act,) that,

"It appears from the legislation of congress that the Indians mentioned in the bill of complaint are citizens of the United States and of the state of South Dakota, and

are entitled to the benefits of and are subject to the laws, both civil and criminal, of the state of South Dakota. By Section 1, Article 7, of the constitution of the state of South Dakota they are qualified electors of the state of South Dakota. They have all the rights and privileges of any citizen of the United States residing within this state. They have a voice in the making of the laws of the state. They are shielded and protected in their persons and property by the laws of the state."

In the case of In Re Now-Ge-Zhuck, 76 Pac. Rep. 877, it is said:

"The act of Congress of February 8, 1887, C. 119, 24 Stat. 388, providing for the alloting of lands constituting an Indian reservation to the Indians in severalty, and the issuing of patents to the allottees therefor, and further providing that, upon the completion of said allotments and the issuing of patents to each of the allottees constituting the tribe, each allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state in which he may reside, upon the completion of the allotments and the issuing of patents to each of the allottees, confers jurisdiction on the state courts to try and punish an allottee for any violation of the laws of the state, though the offense committed be one against the person or property of an Indian or other person within the limits of an Indian reservation."

In Boyd vs. The State of Nebraska, 143 U. S. 162, in the opinion it is said:

"The Act of Congress approved February 8, 1887 (24 Stat. at L. 388), was much broader, and by its terms made every Indian situated as therein referred to, a citizen of the United States."

In Draper vs. United States, 164 U. S. 240, 246, in the opinion it is said:

"From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the state to frustrate the limitations imposed by the laws of the United States upon the title of land once in an Indian reservation, but which has become extinct by allotment in severalty, and in which contingency the Indians themselves would have passed under the authority and control of the state."

THE RIGHTS OF CITIZENS.

A citizen is one who owes the government allegiance, service and money by way of taxation, and to whom the government in turn grants and guarantees liberty of person and conscience, the right of acquiring and possessing property, of marriage and the social relations of suit and defense, and security in person, estate and reputation.

In the case of the United States vs. Cruik-Shank, 92 U. S. 542, it is said:

"Citizens are members of the political body to which they belong; they are the people who compose the community, and who, in their associative capacity, have es-

tablished or submitted themselves to the dominion of government for the promotion of their general welfare and the protection of their individual as well as their collective rights."

In Dred Scott vs. Sanford, 19 How. (U. S.) 476, it is said:

"The words 'people of the United States' and 'citizens' are synonmous terms and mean the same thing. They both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty."

In Lyons vs. Cunningham, 4 Pac. Rep. 938, it is said:

"It is true that a citizen, in the full acceptation of that term may be said to be a member of the civil state, entitled to all its privileges."

In Blank vs. Pausch, 113 Ill. 60, it is said:

"A citizen, in the popular and appropriate sense of the term, is one who by birth, naturalizations, or otherwise, is a member of an independent political society, called a state, kingdom, or an empire, and whom as such is subject to its laws and entitled to its protection in all his rights incident to that relation."

THE UNITED STATES AND THE STATE OF KANSAS CANNOT LEGISLATE ON THE SAME SUBJECT.

It is plain from the foregoing authorities and the Act of Congress of February 8, 1887, that John Butler at the time of the sale of intoxicating liquor to him was a citizen of the state of Kansas and subject to its laws both civil and criminal. If he were a citizen of the state of Kansas, he would owe allegiance to the state and the state would be bound to protect him in his rights as such citizen, and in so doing the state would have the right to legislate concerning the sale of intoxicating liquor to him.

People vs. Bray, 38 Pac. Rep. 731.

If the state has the right to legislate concerning such matters, it cannot belong to the federal government.

In the United States vs. Ward, 1 Kan. 604, it is said:

"It would seem that the right to enforce her criminal laws, in any part of the soil which became a part of the state of Kansas by that act, is a necessary incident to her becoming one of the states of the Union, on an equal footing in all respects with the others. This right is exclusive. It is not a right to be exercised jointly or concurrently with the Federal government. It needs no argument to prove that if this is right, in any given locality, rests with the state of Kansas, it cannot belong to the Federal government."

In State vs. Campbell, 55 N. W. Rep. 553, 555, it is said:

"And if they are thus under the control of Congress,

that control must be exclusive for, as suggested in the case of Kansas Indians, 5 Wall. 737, 'From necessity there can be no divided authority.' It would never do to have both the United States and the State legislating on the same subject."

In the case of Kansas Indians, 5 Wall. 737, it is said:

"If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity, there can be no divided authority."

CITIZENSHIP IS NOT AFFECTFD BY TRIBAL RELATIONS.

A white man being a citizen of a state may, by adoption, become a member of a tribe of Indians, but his citizenship is not affected thereby, and he is still amenable, in every respect, to the laws of such state, both civil and criminal. His adoption into one of these tribes has the effect to bestow on him the privileges and immunities of its members, and subjects him to the laws and usages of the tribe, but it has no greater effect. An Indian who has become a citizen, under an act of Congress, occupies

the same relation to the tribe and the state, as a citizen who has been adopted into one of these tribes.

It will not be contended by the government that a citizen who has been adopted into an Indian tribe is a subject of Federal authority.

If a citizen who has been adopted into a tribe, is not a subject of Federal authority, why should an Indian who is a citizen, be subject to such authority? The answer is that there is no semi-condition of citizenship, a diminished or an abridged right thereof, but that citizenship means and is the same to all citizens of a commonwealth alike, and is as full and complete as the constitution and laws of such state has provided.

In French vs. French, 52 S. W. Rep. 517, it is said:

"A citizen of the United States, who becomes a member of an Indian tribe by adoption, does not lose his citizenship."

Judge Sanborn in the case of Raymond vs. Raymond, reported in 28 C. C. A. 38; 83 Fed. 723, says:

"A citizen of the United States, who becomes a member of one of the civilized Indian tribes by adoption, does not thereby denationalize himself, and does not become an Indian. He remains a citizen of the United States. He still owes support and allegiance to the land of his birth, and is still entitled to her protection against the assaults of every foreign prince, potentate, or power."

In United States vs. Rogers, 4 How. 567, it is said:

"It results from these principles, that a plea, set up by a white man, alleging that he had been adopted by an

Indian tribe, and was not subject to the jurisdiction of the Circuit court of the United States, is not valid."

WHEN AN INDIAN BECOMES A CITIZEN OF THE UNITED STATES, CONGRESS CANNOT REGULATE COMMERCE.

When an Indian becomes a citizen of the United States, he also becomes a citizen of the state wherein he resides.

Gassies vs. Ballon, 6 Peters (U. S.) 761.

When an Indian becomes a citizen of a state, he is subject to its laws both civil and criminal. Congress only has power to regulate commerce of a tribe of Indians who maintain their tribal relations and while they are in a condition to determine for themselves with whom they will have commerce, or are in a condition to have Congress determine it for them. It would be absurd to say that a tribe of Indians who have become citizens of the United States are wards of the government.

This Honorable Court has defined the status of an Indian that is subject to the jurisdiction and control of Congress. In the case of the United States vs. Kagama, 118. U. S. 375, it is said:

"It seems to us that this is within the competency of Congess. These Indian tribes are the wards of the Nation. They are communities dependent upon the

United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection." Again in said case the Court said: "With the Indians themselves these relations are equally difficult to define. They were and always have been, regarded as having a semi-independent position when they preserved their tribal relation; not as States, not as Nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

Indians who have received allotments of land in severalty, are not in a condition of pupilage nor are they dependent upon the Nation for their political rights, but they are citizens and owe allegiance to the States and receive from them protection.

Congress has no power to legislate concerning such an Indian.

The Indians themselves, when off their reservations, or when they have severed their tribal relations or become citizens of the United States are subject to the laws of the State or Territory in which they reside.

In State vs. Williams, 43 Pac. Rep. 15, it is said:

"An Indian who has severed his tribal relations may be prosecuted in the courts of the state, whether the crime was committed within or without the reservation."

In the case of the People vs. Ketchem, 15 Pac. Rep. 353, it is held that an Indian, who is not a member of a

tribe of Indians, is subject to the laws of the state. To the same effect is the case of State vs. Howard, 74 Pac. Rep. 382.

In the case of State vs. Newell, 24 Atl. 943, it is said:

"While they have a partial organization for tenure of property and local affairs, they have no separate political organization, and are subject as individuals to all the laws of the state." And again in the opinion it is said: "Though these Indians are still spoken of as the 'Passamaquoddy Tribe' and perhaps consider themselves a tribe, they have for many years been without a tribal organization in any political sense. They cannot make war or peace; cannot make treaties; cannot make laws; cannot punish crime; cannot administer even civil justice among themselves. Their political and civil rights can be enforced only in the courts of the state. They are as completely subject to the state as any other inhabitant can be."

See Stevens vs. Thatcher, 39 Atl. 282.

In United States vs. Hershman, 53 Fed. 543, it is said:

"I have repeatedly decided that it is not a crime under this statute to dispose of spirituous liquor to British Columbia Indians, or Indians upon whom the rights, privileges, and immunities of citizenship have been conferred by the laws of the United States; and it is my opinion now that the statute under consideration is not applicable to any case of selling or disposing of liquor to an Indian not at the time subject to the general authority and supervision given by the laws of the United States to the officers of Indian affairs."

In the case of In Re Now-Ge-Zhuck, 76 Pac. 877, it is said:

"If allotment of lands in severalty failed to dissolve the tribal relations, it constituted at least a step in that direction. The allotment also constituted the allottee a citizen of the state or territory in which he may reside. It is not to be presumed that the rights of citizenship would be conferred upon the allottee for his benefit, and he be for a period of twenty-five years exempted from the operation of the laws of the state of which he became a citizen, and, aside from those crimes specifically mentioned in the act of March 3, 1885, be restrained only by a code of laws based upon the primitive ideas and standards of a tribal council. An Indian upon whom has been conferred citizenship, and who enjoys the protection of the laws of the state, should be punished for a transgression of them. This we are to presume Congress contemplated. It being shown by the agreed facts that the petitioner was an allottee to whom a patent had been issued, and further shown that the allotments had been made and completed as provided by the act of February 8, 1887, the laws of the state were operative, and the state had jurisdiction to arrest and punish petitioner for the offense by him committed."

The relation of the Indian Tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character. Following the policy of the European Governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution, and the

States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. These Indian governments were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white; and their freedom was constantly acknowledged until about March 3, 1871. These Indian tribes were ruled by a treaty-making system of government for about one hundred years. The tribes were allowed to punish the members thereof for any offense committed against the tribal laws. Congress determined upon a new departure—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes:

"No Indian Nation or Tribe, within the territory of the United States shall be acknowledged, or recognized as an independent Nation, Tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian Nation or Tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

Congress thereafter on March 3, 1885, enacted: "That immediately upon and after the date of the passage of this Act all Indians committing against the person or property of another Indian or other person any of

the following crimes; namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, * * * within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." This Court in the case of The United States vs. Kagama, 118 U. S. 375, held the aforesaid Act of Congress to be valid. This was the first enactment of Congress wherein jurisdiction was conferred upon the Federal Courts to try and punish a tribal Indian for a crime committed on an Indian reservation by one Indian upon the person or property of another Indian. The State of Kansas has had jurisdiction over white persons committing offenses upon the Kickapoo Indian reservation in Brown county, Kansas, ever since its admission into the Union.

The jurisdiction of the Federal government over these Indian tribes rests, not upon the ownership of and sovereignty over the country in which they reside, but upon the fact that, as wards of the general government, they are the subjects of Federal authority within the state.

State vs. Campbell, 55 N. W. Rep. 553, 555.

United States vs. Kagama, 118 U. S. 375.

The only jurisdiction the Federal Court had over the Indians at the time the Act of Congress of February 8,

1887, became a law, was based upon the fact that the Indians were wards of the government, and by that Act the jurisdiction of the person of the Indian was surrendered to the state upon his having received an allotment of land under said Act of Congress. By the Act of Congress of February 8, 1887, the jurisdiction of the person of an allotted Indian was surrendered to the state wherein he resided. There is nothing reserved by the provisions of the aforesaid Act of Congress but the title to the land.

The Act of Congress of January 30, 1897, (29 Stat. 506), attempts to make it a crime for a person to sell intoxicating liquor to an Indian who has received his allotment of land in severalty while the title to the same shall be held in trust by the government. The aforesaid provision of the Act of Congress of January 30, 1897, is unconstitutional and void. Congress has no power to regulate commerce between the citizens of a state even if one is an Indian.

If John Butler became a citizen of the State of Kansas when he received his allotment of land in severalty, he at that minute became subject to the laws of the state of Kansas.

If he became subject to the laws of the State of Kansas, then the United States lost all jurisdiction over him. About the only jurisdiction that is claimed over the Indian by the Federal government is the right to legislate concerning the Indian's appetite for strong drink.

FARRELL VS. UNITED STATES.

In the case of Farrell vs. United States, 110 Fed. 942, it is admitted that an Indian to whom an allotment has been made is a citizen of the United States and of the state of South Dakota. In the opinion of said case p. 942, it is said:

"Under these constitutions and statutes the concession must be made that this Indian was a citizen of the United States and of the state of South Dakota in 1897," again on p. 950, it is said: "These Indians are citizens, but they were originally wards."

If Glode La Framboise was a citizen of the United States and of the state of South Dakota, then John Butler was a citizen of the United States and of the state of Kansas when the sale of intoxicating liquor was made to him.

It is claimed in the case of Farrell vs. United States, that the Nation has the same right and authority to retain control over the commerce with these Indians that it had to retain the title to the lands in trust for them for twenty-five years longer. This I do not admit. The United States could not turn over the jurisdiction of the person of the Indian to the state of Kansas, both civil and criminal, and retain jurisdiction over his appetite for strong drink.

When John Butler became a citizen of the United States and of the state of Kansas, at that time, he became subject to its laws both civil and criminal.

To sustain the reasons given in the Farrell case, it would require this court to hold that the state could legislate concerning all crimes committed by Indians and the Federal government could legislate concerning the Indian's appetite for intoxicating liquor.

But the question, whether the United States could confer the rights of citizenship upon an Indian, a ward of the Nation, and reserve the right to prohibit the sale of intoxicating liquor to such person, is not a question in this case as there is no such provision in the Act of Congress of Feb. 8, 1887.

The Act of Congress of February 8, 1887, makes all Indians to whom allotment shall have been made under the provisions of said act, citizens without any qualification and there is nothing reserved by said act except that the United States is to hold the title of the land thus allotted in trust for a period of twenty-five years.

John Butler was made the same kind of a citizen by said Act of Congress as all other citizens of the state of Kansas are without any qualification whatever.

The Farrell case holds that it is necessary for the Federal government to retain this right for the protection of the Indian, and one would infer from such holding that a state could and would not protect these Indians if they became subject to its jurisdiction.

In this state, we have a law prohibiting the sale of intoxicating liquor, to be used as a beverage, to any person and also have a law that prohibits the sale of intoxicating liquor to an Indian. As a citizen of this state, I

believe we can and will protect the Indians from the baleful effects of intoxicating liquor as well as the Federal government is doing at this time.

It is not claimed by the writer of this brief that it is one of the rights of citizenship to be permitted to drink intoxicating liquor and because of that fact the Act of Congress of January 30, 1897, (29 Stat. 506) is unconstitutional. It is claimed that John Butler, when he received his allotment under the Act of Congress of February 8, 1887, became a citizen of the United States and of the state of Kansas without any limitation upon such citizenship and as such citizen became subject to the laws of the state of Kansas and entitled to the protection given by the laws of said state. If the aforesaid claim is true John Butler is not a subject of Federal legislation, and the Act of Congress of January 30, 1897, is unconstitutional and void. The state of Kansas has the right to regulate the conduct of the citizens of the state and in so doing has the right to prohibit the sale of intoxicating liquor to an Indian.

In State vs. Wise, 72 N. W. 843, it is said:

"It is unnecessary here to enter into any discussion of the question what privileges and immunities are guaranteed by the Federal constitution; for nothing is better settled than that, whatever they are, they are all subject to the proper exercise of the police power of the several states."

In State vs. Lee, 38 S. W. Rep. 583, it is said:

"It is not only within the power of the state to do

so, but it is its duty to protect its citizens and advance the safety and prosperity of its people."

In Breechbill vs. Randall, 1 N. E. Rep. 362, it is said:

"The power to make police regulations for the protection of its citizens against fraud and imposition is not taken from the states by the federal constitution, or by any national statute. It has, indeed been authoritively settled that the national legislature cannot exercise police power for the protection of the inhabitants of a state. This is a domestic matter, to be governed and regulated by state laws."

In New vs. Walker, 108 Ind. 365, 9 N. E. Rep. 386, it is said:

"It has been directly decided by the Supreme Court of the United States, as well as by this court, that the national congress cannot make police regulations for the protection of the people of the state. * * * As the federal legislature cannot enact police regulations which will yield the citizens of the state just protection, it must be that the state legislature may enact such regulations, or the citizens be left without protection."

See W. U. Tel. Co. vs. Pendleton, 95 Ind. 12.

In Hockett vs. State, 5 N. E. Rep. 181, it is said:

"It is a power inherent in every sovereignty, and is, in the broadest sense, nothing more than the power of a state to govern men and things within the limits of its own dominion."

In Board of Excise vs. Barrie, 34 N. Y. 666, it is said:

"A state is not sovereign, without the power to regulate all its internal commerce as well as police."

In Cooley on Const. Lim., Par. 572, it is said:

"The police of the state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

In United States vs. DeWitt, 9 Wall. (U. S.) 41, it is said:

"Congress has no power, under the Constitution, to prohibit trade within the limits of a state."

In License Tax Cases, 5 Wall. 462, 475, it is said:

"We now come to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued for the defendant in error that a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the state in which the defendants resided; that the internal trade of a state is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under Acts of Congress, must therefore be absolutely null and void, and consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed."

In Slaughter House Cases, 16 Wall. (U. S.) 36, in the opinion it is said:

"This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of Ward vs. Md., 12 Wall., 430 (79 U. S., XX., 452), while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the state governments were created to establish and secure."

In the case of Farrell vs. United States, 110 Fed. 951, it is said:

"The question which has been discussed is a serious one, and it is not free from doubt. It has received investigation, study, and deliberation."

In the last mentioned case, the court seems to have had some doubt as to the correctness of their decision. I think that the court in the case of Farrell vs. United States, must have overlooked what are the rights of citizens of a state and the rights of a state. No one can, in the correct sense of the term, be a citizen of a state, who is not entitled, upon the terms prescribed by the institutions of the state, to all the rights and privileges conferred by those institutions upon the highest class of soci-

ety. A citizen is one who, by birth, naturalization, or otherwise, is a member of an independent political society, and as such is subject to its laws and entitled to its protection in the enjoyment of civil or private rights.

A state has, as a general rule, absolute and exclusive jurisdiction over persons and things within its territory.

By the Act of Congress of January 30, 1897, (29 Stat. 506), the sale of intoxicating liquor is prohibited, "to any Indian to whom an allotment of land has been made, while the title to the same is held in trust by the government, or to any Indian a ward of the government under the charge of an Indian superintendent or agent."

It is plain from the foregoing provisions of said act that Congress intended a distinction between Indians who had received allotments, and wards of the government under the charge of an Indian superintendent or agent.

It would require entirely different proof to sustain an indictment charging a sale of intoxicating liquor to an Indian to whom an allotment had been made while the title to the same was held in trust by the government, and an indictment charging the sale of intoxicating liquor to an Indian, a ward of the government under the charge of an Indian superintendent or agent. Under the first indictment, the government would be required to prove a sale of intoxicating liquor to an Indian to whom an allotment had been made, and that the title to the same was held in trust by the government. This evidence would sustain a conviction under such indictment. No proof would be required that such Indian belonged to

any tribe of Indians or that such Indian was under the charge of an Indian superintendent or agent It seems that under such an indictment, the proof that the Indian's land is held in trust by the United States is sufficient to sustain a conviction. The fact that the title to land is held in trust for another does not make the party for whom the land is held a ward of such trustee. A ward is one who is under the care and control of a guardian.

Under the Act of Congress of February 8, 1887, all Indians to whom allotments have been made in severalty under the provisions of said Act are citizens of the United States and subject to the laws, both civil and criminal, of the state wherein they reside. These provisions are not consistent with the claim of the government that they are wards of the Nation. Under said Act, the government is simply a trustee for the lands and monies of said Indians. The government has no control whatever of the person of an alloted Indian other than it has of any other citizen of the state. The state has the right to legislate concerning such an Indian and it is its duty to protect him in all his rights as a citizen. If this be true, John Butler was not a ward of the government, but a citizen of Kansas, and the conviction cannot be sustained. Under the second indictment, it would be necessary to prove a sale of intoxicating liquor to an Indian, a ward of the government, under the charge of an Indian superintendent or agent. Under such indictment to sustain a conviction, it would be necessary to prove

that the Indian to whom the sale of liquor was made was a tribal Indian, and in a state of pupilage; dependent upon the United States; dependent largely for his daily food; dependent for his political rights. He must owe no allegience to the state and receive from it no protection. Such an Indian is subject to the jurisdiction and control of Congress. John Butler is not such an Indian. He is not dependent upon the United States for his political rights nor is he in a state of pupilage but a citizen of the United States and of the state of Kansas. He owes allegience to the state of Kansas and receives from it protection.

(In Re Now-Ge-Zhuck, 76 Pac. 877.) There is no court that holds that a citizen Indian, who has severed his tribal relations, is subuject to the control of Congress.

In the 16 Am. and Eng. Enc. of Law 222, 223, 2nd Ed., it is said:

"The Indians themselves, when off their reservations, or when they have severed their tribal relations or become citizens of the United States are subject to the laws of the state or territory in which they reside."

If an Indian to whom an allotment of land in severalty has been made under the provisions of the Act of Congress of February 8, 1887, is a citizen of the United States and the state in which he resides and is subject to the laws of such state, then, the government cannot legislate concerning him.

The State and the Government cannot legislate upon

the same subject. There is no such thing as a divided jurisction. It would never do to have the United States and the state legislating on the same subject.

If the state of Kansas has jurisdiction of the person of John Butler, that jurisdiction must be exclusive. It would not do for this Court to say that the state of Kansas has exclusive jurisdiction of the person of John Butler and that the Federal Government had exclusive jurisdiction to legislate concerning his appetite for strong drink. To sustain the contention of the Government it would be necessary for this Court to so hold. I believe John Butler's appetite for intoxicating liquor cannot be a ward of the Government, and under the exclusive control and protection of Congress, and the person of said Indian be a citizen of the United States and of the state of Kansas and under the exclusive jurisdiction of said state.

It seems that the foregoing has been sustained by the courts.

The Supreme Court of the state of Kansas in the case of In Re Now-Ge-Zhuck, 76 Pac. Rep. 877, holds that the state of Kansas has jurisdiction to try and punish an allottee for any violation of the laws of the state, though the offense committed be one against the person or property of an Indian or other person within the limits of an Indian reservation.

The Circuit Court of Appeals in the case of Farrell vs. United States, 110 Fed. 942, holds that under its power to regulate commerce with the Indian tribes

(Const. Art. I. § 8), Congress had authority to pass the Act of January 30, 1897, (29 Stat. 506), which declares it to be a crime punishable by fine and imprisonment to sell spirituous liquors to any Indian to whom an allotment of lands has been made while the title thereto is held in trust by the government.

Either the Supreme Court of Kansas or the Circuit Court is wrong. One of these courts is without jurisdiction. Both cannot be right. There can be no divided jurisdiction.

I believe that the decision in Farrell vs. United States is the one that is contrary to law. In that case, the court holds that an Indian who has received an allotment under the Act of February 8, 1887, is subject to the laws both civil and criminal of the state wherein he resides, and that such an Indian is a citizen of the United States. For the foregoing reasons, that portion of the Act of Congress of January 30, 1897, which prohibits the sale of intoxicating liquor to an Indian to whom an allotment has been made while the title thereto is held in trust by the government, is unconstitutional and void.

REPLY TO BRIEF OF RESPONDENT.

It is admitted that the Kickapoo tribe of Indians prior to their taking allotments of land in severalty under the Act of Congress of February 8, 1887, were tribal Indians and wards of the government.

Congress had the power at that time to regulate commerce with such tribe or the members thereof.

WHAT EFFECT DID THE ACT OF CONGESS OF FEBRUARY 8, 1887, HAVE UPON THE TRIBAL ORGANIZATION OF THE KICKAPOOS?

It is admitted by the respondent that all of the Kickapoo tribe of Indians had taken allotments of land in severalty, under the provision of said act prior to February 1895. (Brief of Res. pp. 9, 10.)

The Act of Congress of February 8, 1887, was intended to extend the laws of the United States and the territory over various tribes of Indians

Every court which has been called upon to construe said Act of Congress, holds, that allottees under said Act are citizens of the United States and of the state wherein they reside and are subject to the laws, both civil and criminal, of said state.

The respondent admits that Indians to whom allotments have been made are citizens of the United States and subject to the laws of the state wherein they reside. (Brief of Res. pp. 19, 20).

The Act of Congress of February 8, 1887, simply provides that all Indians to whom allotment shall have

been made under the provisions of said act are citizens of the United States and of the state wherein they reside and makes each allottee subject to the laws, both civil and criminal, of said state and further provides that the title to the land shall be held in trust by the government for a period of twenty-five years or longer and that certain monies will be held by the government for the use and benefit of the tribe or the members thereof.

The government by said Act relinquished all control over the person of the Indian and reserved only the rights of a trustee of the allottee's land and monies.

Section 6, of said Act provides that each Indian to whom an allotment shall have been made shall be a citizen of the United States, "without in any manner impairing or otherwise affecting the rights of any such Indian to tribal or other property."

It is plain to be seen that Congress by such provision intended to do away with the tribal relations of allotted Indians except in so far as it was necessary to dispose of any monies or land still held by the government in trust for said Indians. The effect of said provision is that the government will consider such allottees members of said tribe of Indians for the purpose of settling up their affairs and disposing of the property held in trust by the government and for no other purpose. Indians who have received allotments under said Act, are no longer the wards of the Nation but citizens of the United States. Where there is a ward, there must be a guardian. A guardian is one who has the right to con-

trol the person of his ward. In effect by the Act of Congress of February 8, 1887, the rights of majority were conferred upon the allottees. By said Act, Congress lost all jurisdiction of the person of an allottee, it only reserved to the government the rights of a trustee. The Kickapoo Indians have surely severed their tribal relations.

In the case of the United States vs. Rickert, 106 Fed. 1, 6, it is said:

"These Indians have severed their tribal relations, and adopted the ways of civilized life, and have become full citizens of the United States, and owners of property in the state of South Dakota."

Again in the opinion of said case on page 6, it is said:

"The Indians mentioned in the bill occupy about the same relation with reference to the United States and the state of South Dakota as do settlers upon the public lands of the United States, who have entered and paid for their land, and done everything that is required to be done by the laws of the United States to give them title to the land upon which they reside; the naked legal title, simply, remaining in the United States."

It is plain that Congress by said Act, intended to confer upon allottees the rights and duties of citizenship and at the same time secure to them a home for at least twenty-five years. The fact, that the Act provides that the title to land shall be held in trust by the govenment, in nowise limits the allottees citizenship, nor does it in the slightest degree detract from the dignity or value of citizenship.

In the case of Beck vs. Flournoy Live Stock and Real Estate Co., 65 Fed. 35, it is said:

"The only argument that has been advanced to sustain the validity of the leases in question is founded on Section 6 of the Act of February 8, 1887, heretofore quoted. It is suggested, as we understand, that because Congress conferred the right of citizenship upon all Indians to whom allotments of land might be made, and upon every Indian who should take up a residence separate and apart from his tribe, and adopt the habits of civilized life, the power to sell, lease, and otherwise dispose of allotted lands was also conferred as a necessary incident of citizenship. It is urged, as we understand, that Congress could not make these Indians citizens of the United States without at the same time giving to them the unrestricted power to sell, use, and control all property whatsoever in which they chanced to have an interest. This argument appears to us to be untenable. We know of no reason, nor has any been suggested, why it was not competent for Congress to declare that these Indians should be deemed citizens of the United States, and entitled to the rights, privileges, and immunities of citizens, while it retained, for the time being, the title to certain lands, in trust for their benefit, and withheld from them for a certain period the power to sell, lease, or otherwise dispose of their interest in such lands. It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real property, and to withhold from the donee, for a season, the power to sell or otherwise dispose of it. And we can conceive of no sufficient reason why the United States, in the exercise of its sovereign power,

should be denied the right to impose similar limitations especially when it is dealing with a dependent race like the Indians, who have always been regarded as the wards of the government. Citizenship does not carry with it the right on the part of the citizen to dispose of land which he may own in any way that he sees fit without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent upon, citizenship; neither does it detract in the slightest degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived, for the time being, of the right to alienate it. It does not follow, therefore, that the power of these Indians to deal with land which was held by the government in trust for their benefit was sensibly enlarged, or that the restriction against alienation found in the fifth section of the Act of February 8, 1887, was removed, because, in the sixth section of the same Act, Congress saw fit to declare that when land had been allotted to an Indian, or he had separated from his tribe, and adopted the habits of civilized life, he should be entitled to all the 'rights, privileges, and immunities' of a citizen. The two sections of this Act are by no means inconsistent with each other. The clause imposing a limitation upon the power of alienation is not in conflict with the subsequent clause conferring the boon of citizenship. Both provisions may well stand together. They were inserted for a well-defined purpose, which it is easy to comprehend; and the Act should be so construed as to give effect to both provisions, and thereby accomplish the purpose of the lawmaker."

From the foregoing, well written opinion of Judge Thayer, it is plain that Congress intended to surrender

the person of the allottee Indian to the state and retain only the control over his land. No restriction was placed upon an allottee's rights as a citizen and none upon the right of a state to legislate concerning him.

In the case of In Re Now-Ge-Zhuck, 76 Pac. 879, it is said:

"It is apparent that by Section 6 of the Act it was the intention of Congress to extend to the Indian, give him the benefit of, and make him subject to the laws, both civil and criminal, of the state or territory in which he may reside, upon the completion of the allotments and the patenting of the lands to the allottees. The only reservation of Federal jurisdiction in the Act of February 8, 1887, is the withholding from the Indian the absolute title of the allotted lands for a period of twenty-five years, or longer if the President of the United States in his discretion extend the period."

In the opinion of said case on page 880 it is said:

"The allotment also constituted the allottee a citizen of the state or territory in which he may reside. It is not to be presumed that the rights of citizenship would be conferred upon the allottee for his benefit, and he be for a period of twenty-five years exempted from the operation of the laws of the state of which he became a citizen."

The Kickapoo tribe of Indians are no longer such a tribe as the framers of the Constitution had in mind when they wrote it. They are in no condition to determine anything as a tribe except what shall be done with the surplus land not allotted on said reservation. Congress can only regulate commerce with those tribes which are

in a condition to determine for themselves with whom they will have commerce or are in a condition to have Congress determine it for them.

ASSUMING THAT INDIANS WHO HAVE RECEIVED THEIR FIRST PATENT FOR LANDS ALLOTTED TO THEM UNDER THE ACT OF 1887 ARE SUBJECT TO THE CIVIL AND CRIMINAL LAWS OF THE STATE, THAT FACT IS INCONSISTENT WITH THE POWER OF CONGRESS TO REGULATE COMMERCE WITH THEM.

If these Indians to whom allotments have been made are citizens of the United States and the state of Kansas and are subject to the laws, both civil and criminal, of the state wherein they reside, they are not under the control of Congress. The control of Congress over the Indians who compose the Indian tribes in this country, has always been based upon the fact that they are wards of the government and under the exclusive jurisdiction and control of Congress.

In the brief of Respondent or page 23 this language is used:

"The observation in The Kansas Indians (5 Wall. 737, 755), that if the Indians are under the control of Congress, 'from necessity there can be no divided jurisdiction,' is manifestly inapplicable where Congress chooses to divide its jurisdiction with the state."

The jurisdiction of Congress over the Indians has

always been based upon the fact that they were wards of the government.

United States vs. Kagama, 118 U. S.., 375.

State vs. Campbell, 53 Minn., 354.

The Respondent argues that this jurisdiction might be divided by Congress with the state. In this case, Congress would have the jurisdiction of a ward of the government to divide with the state.

It is claimed by the government that Congress by the Act of February 8, 1887, gave the state jurisdiction of the person of an allottee and retained the jurisdiction of the allottee's appetite for intoxicating liquor. It seems that such a claim cannot be sustained as the person of an allottee Indian is not a thing which can be divided into parts.

In the brief of Respondent, page 24, it is said:

"Any jurisdiction that the state may have over the Indian's being, derived from Congress, is subject to alteration and repeal by Congress. It follows, therefore, that if the jurisdiction conferred upon the States by the Act of February 8, 1887, over Indian allottees is inconsistent with the Act of January 30, 1897, the former Act must be held to be in so far repealed."

This is not the law. Congress has no power to repeal a former Act of Congress granting jurisdiction in a given matter, to a state, without the consent of the state.

After Congress gave the state of Kansas jurisdiction of the Indian allottees, it lost all control over them and

could not regain jurisdiction of them without the consent of the state.

Fort Leavenworth R. R. Co. vs. Lowe, 114 U. S. 525

In the case of Ft. L. R. R. Co. vs. Lowe, 27 Kan. 760, it is said:

"It takes two parties to make a contract; and it takes the action of both the state government and the federal government, before jurisdiction can be transferred from the state government to the federal government; and, so far as is shown in the present case, only one party has acted—the state of Kansas."

In United States vs. Stahl, 1 Kan. 606, it is said:

"The right to exercise jurisdiction over the crime of murder having been vested in the state of Kansas by the act admitting her as a state, and she never having parted with that right, it cannot belong to the United States."

See also Clay vs. State, 4 Kan. 49.

It seems that before a state can be divested of its jurisdiction over territory or persons within its limits, it must consent to such divestment.

Sinks vs. Reese, 19 Ohio St. 306.

Kansas has never consented to surrender its jurisdiction over the person of an allotte Indian to the fedaral government. If by an Act of Congress the allottee Indians who have become citizens could be made subject to the jurisdiction of the government, then Congress could make any citizen of a state a ward of the government and oust the state of its jurisdiction. This cannot be the law.

Another question, can the citizen, without his consent, be deprived of his political rights and his right to

be protected by the laws of his state? We think not. When a person is a citizen of the United States and of the state in which he resides, it means something, and he cannot be deprived of the rights as such citizen without his consent. Congress has no such power. If Congress had the power to make one citizen a ward of the government, it could make all of the citizens of a state wards of the government and enact police regulations for their protection.

CITIZENSHIP OF INDIAN ALLOTTEES INCONSISTENT WITH GUARDIANSHIP OF CONGRESS.

In the brief of respondent on page 24, it is said: "The Act of February 8, 1887, itself contemplates the further control of Congress."

There is no provision in said Act that provides for the further control of allottee Indians by Congress. The only right reserved to the federal government by said Act is the control of the land and monies of said allottee Indians.

In the case of Beck vs. Flournoy Live-Stock & Real Estate Co., 65 Fed. 35, Judge Thayer very ably discussed the provision of said Act.

In the case of United States vs. Rickert, 106 Fed. 5, 6, Judge Garland discusses the status of allottee Indians.

The Act of Congress of February 8, 1887, imposes a limitation upon the power of alienation of the allottee of the land thus allotted and by a subsequent clause confers the boon of citizenship. Both provisions may well stand together. By said Act, Congress gave up the guardianship of the person of the Indian and retained only the guardianship of his lands and monies.

A guardian is "one to whom the law intrusts the care of the person or property, or both, of another. More specifically, one to whom the law intrusts the care of the person or property, or both, of an infant."

15 A. & E. E. of L. 20, 2nd Ed.

The government can control only the land and monies of the Indian and is therefore only the guardian of their property.

A ward is "one whose person or property, or both, are under the control of a guardian. More specifically, a minor over whose person or property, or both, a guardian has been appointed by lawful authority."

15 A. & E. E. of L. 20, 2nd Ed.

It seems from the foregoing that there may be a guardian of the property of a person and not of his person. This is what the Act of Congress of February 8, 1887, provides for and if the allottee Indians are wards of the government they are wards by virtue of the guardianship of their property. This is not the kind of a ward that the government has the right to legislate concerning.

POWER OF THE FEDERAL GOVERNMENT TO PROTECT THE INDIANS DEPENDENT UPON HIS TRIBAL RELATIONS.

The constitution of the United States and all of the decisions of this court are to the effect that the Indian must be a tribal Indian before Congress can exercise jurisdiction over him.

United States vs. Thomas, 151 U. S. 585.

United States vs. Holliday, 1 Wall. (U. S.) 416.

For all of the foregoing reasons your petitioner should be discharged.

A. E. CRANE,
Attorney for Petitioner.